IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

DIANE BYNUM and FOUNTAIN PARRISH,	: No. 418 EAL 2002
	: Application for Reconsideration
	: of denial of Petition for
v.	: Allowance of Appeal
THOMAS JEFFERSON UNIVERSITY HOSPITAL and DR. PHILIP HIRSHMAN AND HEE-OK PARK CHAI, M.D.,	:
PETITION OF: THOMAS JEFFERSON UNIVERSITY HOSPITAL and DR. PHILIP HIRSHMAN, M.D.	:

ORDER

PER CURIAM

AND NOW, this 6th day of February 2003, the Application for Reconsideration of the Denial of the Petition for Allowance of Appeal is **DENIED.**

TRUE COPY FROM RECORD

Attest: FEB 6 2003

/s/ Patricia Johnson

Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

DIANE BYNUM and FOUNTAIN PARRISH,	:	No. 418 EAL 2002
	:	
	:	Petition for Allowance of
Respondents	:	Appeal from the Order of the
	:	Superior Court
	:	
v.	:	
	:	
	:	
THOMAS JEFFERSON UNIVERSITY HOSPITAL and DR. PHILIP HIRSHMAN AND HEE-OK PARK CHAI, M.D.	:	
	:	
PETITION OF: THOMAS JEFFERSON UNIVERSITY HOSPITAL and DR. PHILIP HIRSHMAN, M.D.,	:	
	:	
	:	

ORDER

PER CURIAM

AND NOW, this 10th day of December 2002, the Petition for Allowance of Appeal is DENIED.

TRUE COPY FROM RECORD

Attest: DEC 10 2002

/s/ Patricia Johnson

Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

DIANE BYNUM AND FOUNTAIN PARRISH,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
THOMAS JEFFERSON UNIVERSITY HOSPITAL AND DR. PHILIP HIRSCHMAN AND Hee-PK PARK CHAI, M.D.,	:	
Appellees	:	No. 3485 EDA 2000

ORDER

AND NOW, this 31st day of July, 2002, IT IS HEREBY ORDERED:

THAT the application filed June 12, 2002, requesting reargument/reconsideration of the decision dated May 29, 2002, is DENIED.

PER CURIAM

DIANE BYNUM and FOUNTAIN PARRISH,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
	:	
v.	:	
	:	
THOMAS JEFFERSON UNIVERSITY HOSPITAL and DR. PHILIP HIRSCHMAN and Hee-OK Park Chai, M.D.	:	No. 3485 EDA 2000
	:	

Appeal from the Judgment entered February 12, 2001, Court of Common Pleas, Philadelphia County, Civil Division at Nos. 923 March Term, 1998 & 2294 December Term, 1998.

BEFORE: McEWEN, JOHNSON, and JOYCE, JJ.

MEMORANDUM: **FILED MAY 29, 2002**

Diane Bynum (Bynum) and Fountain Parrish (Parrish), husband and wife, appeal from the judgment entered in a medical malpractice case after the trial court denied their post-trial motions. Bynum and Parrish allege that, as a result of the negligence of Dr. Philip Hirshman, their fetus was stillborn. Bynum and Parrish sought damages for emotional distress. Bynum and Parrish contend that the trial court erred in permitting testimony that Bynum had aborted a prior pregnancy and had considered aborting the pregnancy at issue. Additionally, Bynum and Parrish assert that the trial court improperly removed Hospital's name from the jury interrogatories, that the trial court's conduct during trial hampered Bynum and Parrish's counsel's exercise of trial strategy, and that the court improperly imposed a deadline for the jury's deliberations. We conclude that the testimony concerning the prior and contemplated abortions was unduly prejudicial, and therefore, we reverse the judgment and remand for a new trial.

This case arises from the stillbirth of Bynum's fetus in December 1996. Bynum's expected due date was December 23, 1996. On December 20, 1996, Bynum saw Dr. Hirshman, a third year OB/GYN resident at Thomas Jefferson University Hospital (Hospital), for a prenatal visit. During

the visit, Dr. Hirshman indicated a positive fetal heartbeat and fetal movement on the prenatal flow record. He instructed Bynum to return in one week to be induced if she had not gone into spontaneous labor. Bynum contends that during the visit she told Dr. Hirshman that she had experienced decreased fetal movement. Dr. Hirshman denies that Bynum told him and asserts that if Bynum had told him that she experienced decreased fetal movement then he would have performed more tests prior to sending her home. On December 23, 1996, Bynum went to Hospital complaining that she had not felt any fetal movement since that morning. An ultrasound ndicated that the fetus had died *in utero*. Bynum and Parrish sought damages for emotional distress. Bynum and Parrish admit that there is no evidence of Hospital's independent liability and their only claim against Hospital is one of vicarious liability.

Bynum and Parrish filed suit against a number of defendants. In September 1999, the court consolidated the cases, and the parties stipulated to the dismissal of all defendants other than Hospital and Dr. Hirshman. Bynum claimed that she informed Dr. Hirshman that the fetus was moving less on the day of the prenatal visit and that Dr. Hirshman's failure to take further action caused the stillbirth. The only claims against Hospital were those of vicarious liability for the actions of Dr. Hirshman who was a resident doctor and a Hospital employee. Bynum and Parrish sought damages for emotional distress resulting from how they learned that their baby was stillborn. In April 2000, the original trial of this case ended in a hung jury.

During the jury trial in June 2000, the Honorable Mark I. Bernstein permitted testimony concerning Bynum's prior abortion and her consideration of aborting the pregnancy in question. Additionally, the trial court instructed defense counsel regarding discourtesy and proper questioning. The trial court also refused to include jury interrogatories requested by the plaintiffs regarding Hospital's liability. At the conclusion of the trial, the trial judge told the jury

that due to a personal commitment the judge would be leaving the courthouse at approximately 3:30 that day and therefore would only be able to receive the verdict either before he left that afternoon or the next morning. The judge made it clear to the jury that they could deliberate for as long as they needed. The jury returned their verdict at 3:50 finding Dr. Hirshman not negligent in his medical care. Bynum and Parrish filed this timely appeal after the trial court denied Bynum and Parrish's motion for post-trial relief.

Bynum and Parrish present the following issues for our review:

1. Whether trial court committed reversible error in permitting testimony concerning [Bynum's] termination of a previous pregnancy in 1992?

2. Whether the trial court committed reversible error in permitting testimony concerning [Bynum's] consideration of the termination of this pregnancy by abortion?

3. Even if issues concerning the previous abortion and consideration of abortion are relevant, it was still excluded pursuant to Rule 403 of the Rules of Evidence and it was reversible error to permit cross-examination.

4. Whether trial court improperly removed [Hospital's] name from the jury interrogatories?

5. Whether trial court's constant attack of counsel for defendant improperly prevented plaintiffs' counsel from determining in his discretion when to object to certain points or to exercise any trial strategy and improperly disrupted trial?

Brief for Appellant at 4.

We will not overturn a decision to grant or deny a motion for a new trial unless the trial court "grossly abused its discretion or committed an error of law that controlled

the outcome of the case." ***Collins v. Cooper,*** 746 A.2d 615, 617 (Pa. Super. 2000).

Bynum and Parrish's first three questions concern the admissibility of evidence regarding Bynum's prior abortion and her contemplated abortion of the pregnancy in question. As these questions are interrelated, we will address them together.

We recently elaborated on the standard for reviewing the admissibility of evidence:

> In order to find that the trial court's evidentiary rulings constituted reversible error, such rulings must not only have been erroneous but must also have been harmful to the complaining party. Appellant must therefore show error in the evidentiary ruling and resulting prejudice, thus constituting an abuse of discretion by the lower court. Based upon such showing, our only remedy is to grant a new trial.

Collins v. Cooper, 746 A.2d 615, 619-620 (Pa. Super. 2000) (internal quotations and citations omitted).

Bynum and Parrish first contend that the testimony concerning the prior abortion and the contemplated abortion was not relevant to the issues in the case, and therefore inadmissible. Brief for Appellants at 13. Bynum and Parrish contest the court's conclusion that the evidence was relevant to damages. They further object to the implication that they suffered less from the loss of their child than would a plaintiff who had not previously had an abortion. Brief for Appellants at 13.

Additionally, Bynum and Parrish contest the trial court's second rationale for admitting the evidence. Brief for Appellants at 15. The trial court concluded that Bynum and Parrish had placed the records at issue through allegations of alteration or inaccuracy. Trial Court Opinion, 5/16/01, at 10-11. The court concluded accordingly that all

parts of the records were relevant including those that referenced prior pregnancies. Trial Court Opinion, 5/16/01, at 10-11. Bynum and Parrish contend that they did not allege that the records had been altered but rather that information, such as Bynum's name and details of the December 20, 1996 prenatal visit had not been recorded accurately. Brief for Appellants at 15.

Alternatively, Bynum and Parrish assert that, even if the testimony was relevant, the issue of abortion is inherently prejudicial and should only be allowed when it directly impacts the issues in the case. Brief for Appellants at 16. Plaintiffs claim that "[a]ny consideration of the issues surrounding abortions are tainted with unfair prejudice as it has nothing to do with liability [or] the emotional distress that [Bynum] suffered. It did have to do with how certain jurors would view [Bynum] and her value of life." Brief for Appellants at 20-21. Bynum and Parrish contend that the purpose of the testimony was to "inflame and prejudice and affect [Bynum's] credibility and it should not have been allowed pursuant to rules 402 and 403 of the Pennsylvania Rules of Evidence." Brief for Appellants at 13-14. Bynum and Parrish contend that the jurors' decision on negligence rested on whether they believed Bynum or Dr. Hirshman's testimony regarding whether Bynum mentioned decreased fetal movement at the prenatal visit. Therefore, if the abortion testimony prejudiced the jury's opinion of Bynum and thus her credibility, the admission of the testimony is reversible error. Brief for Appellants at 17-18, 19-20. Bynum and Parrish assert that the abortion testimony should have been excluded under Rule 403 of the Pennsylvania Rules of Evidence because the probative value was outweighed by the danger of unfair prejudice.

Our Rules of Evidence state that all relevant evidence is admissible, unless otherwise provided, and that evidence that is not relevant is inadmissible. ***See*** Pa.R.E. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. A trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury." ***Fisher v. N. Hills Passavant Hosp.,*** 781 A.2d 1232, 1234 (Pa. Super. 2001). Evidence will be deemed unduly prejudicial "not where it merely hurts a party's case, but where it tends to fix a decision which has an improper basis in the minds of the jury." ***Id.*** at 1234 (quotations and citations omitted); ***see also*** Pa.R.E. 403.

Hospital and Dr. Hirshman present us with cases in which courts admitted testimony relating to abortions. Brief for Appellees at 15-16. Upon review of the cases, however, we conclude that they are inapposite. A number of the cases involve medical malpractice claims against doctors who performed ineffective abortions or against doctors or individuals whose alleged negligence caused the plaintiffs to have an abortion. ***See e.g. Speck v. Finegold,*** 439 A.2d 110 (Pa. 1981) (involving claim against doctor who preformed ineffective vasectomy and abortion); ***Coveleski v. Bubnis,*** 634 A.2d 608 (Pa. 1993) (involving car accident where mother sought damages for wrongful death of eight week old fetus whom she aborted for fear of damage as a result of accident). In these cases, the testimony regarding the plaintiffs' abortions was essential to the plaintiffs' case due to the fact pattern of the cases and the basis of the claims.

In the case at hand, the trial court determined that the abortion testimony was relevant to the jury's determination of the amount of damages to award. We disagree. The trial court based its relevancy conclusion on mere speculation that a prior abortion would effect the suffering felt after the loss of an entirely separate pregnancy. We discern no correlation between an abortion four years prior and the degree of emotional distress parents would feel upon hearing that their full term baby had died *in utero* after a

subsequent pregnancy. The defendants did not present evidence that the prior abortion was a voluntary act by Bynum. Additionally, we see no relevance in Bynum's contemplation of abortion in the early months of the pregnancy in question. Once the parents determined to carry the pregnancy to term, they negated by their conduct any prior intent to abort, as a consequence of which the prior contemplation is irrelevant.

Additionally, we find no relevance in testimony regarding the prior abortion or the contemplation of the pregnancy to the issue of accuracy of the records, which the trial court asserts in its 1925(a) opinion. The fact that the medical history form correctly reflected the number "3" in the prior pregnancy box does not provide any relevant information to the issues in this case. The accuracy of the records could have easily been established without reference to the small section of the record concerning prior pregnancies. Therefore, we conclude that the testimony should have been excluded as not relevant pursuant to Pa.R.E. 401 and 402.

Even if the testimony could be deemed relevant, the trial court nonetheless erred because the testimony was unduly prejudicial. The outcome of this case depended substantially on whether the jury believed Bynum, as opposed to Dr. Hirshman, when she said she told Dr. Hirshman that she had noticed decreased fetal movement during her last pre-natal visit. Currently this nation is polarized on the issue of abortion with some members of our community exhibiting extreme negative reactions to women who have abortions or to persons who advocate for a woman's right to choose an abortion. We conclude in view of this circumstance that the references to abortions may likely have fixed a "decision which [had] an improper basis in the minds of the jury." ***Fisher,*** 781 A.2d at 1234 (quotations and citations omitted). Although we recognize that the testimony was not lengthy, we conclude that its inclusion was demonstrably prejudicial. Considering the

minor relevance, if any, of the abortion testimony to the facts of this case, we conclude that the probative value did not outweigh the prejudice of the testimony to Bynum and thus should have been excluded pursuant to Pa.R.E. 403. Pa.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. . . ."). Therefore, we conclude that a new trial is necessary to correct the trial court's abuse of discretion in allowing the testimony regarding the prior and contemplated abortions.

In their fourth issue, Bynum and Parrish contend that the trial court erred by removing Hospital's name from the jury interrogatories. We have previously stated our standard of review of a trial court's decision to grant or refuse a request for special interrogatories:

> Generally, a trial judge in Pennsylvania may grant or refuse a request for special findings on the basis of whether such would add to the logical and reasonable understanding of the issue. We will not disturb a trial judge's decision to grant or refuse the request absent an abuse of discretion.

Century 21 Heritage Realty, Inc. v. Bair, 563 A.2d 114, 116 (Pa. Super. 1989).

Bynum and Parrish contend that the trial court erred in omitting Hospital's name from the jury interrogatories. Brief for Appellants at 23. Bynum and Parrish argue that Hospital should have been included on the interrogatories because under the doctrine of vicarious liability the master may be primarily liable. Brief for Appellants at 23. Bynum and Parrish further contend that the trial court incorrectly concluded that Bynum and Parrish needed to present evidence of direct liability in order to keep Hospital on the interrogatory. Brief for Appellants at 24. "[Hospital] was not a guarantor for defendant Hirshman but a co-defendant liable in its own right." Brief for Appellants at 24. Additionally, the plaintiffs note that the jury did question

the interrogatories: "Are we to view [Hospital] and Dr. Hirshman as one entity to decide our verdict?" Brief for Appellant at 25 quoting N.T., 6/8/00, at 699-700. Bynum and Parrish contend that the interrogatories confused the jurors when Hospital was included in the case caption but not the interrogatories.

The trial court refused to include Hospital's name on the jury interrogatories because Bynum and Parrish had not presented any evidence concerning any direct liability by Hospital but only claimed that Hospital was liable through its agent, Dr. Hirshman. Trial Court Opinion at 3-4. The court concluded that to allow the jury "to determine whether [Hospital] was independently liable, when there was no evidence of independent liability, would only invite a finding of direct liability where even plaintiffs concede there was no evidence to support such a verdict." Trial Court Opinion, 5/16/01, at 5. Therefore, any interrogatory regarding direct liability "would invite confusion or worse, an inconsistent verdict unsupported by any evidence." Trial Court Opinion, 5/16/01, at 6. The trial court in this case clearly instructed the jury that any verdict against Dr. Hirshman would be molded to include Hospital as the doctor's employer. N.T. 6/8/00, at 694. The trial court answered in the affirmative the jury's question as to whether they should treat Dr. Hirshman and Hospital as one entity. N.T. 6/8/00, at 698. Hospital in no way contested the relationship with Dr. Hirshman. Trial Court Opinion at 5. Additionally, Bynum and Parrish do not cite any authority for the argument that they had a legal right to have Hospital on the interrogatories. Therefore, we conclude that the trial court did not abuse its discretion when it granted Hospital's request to remove its name from the jury interrogatories.

Bynum and Parrish additionally allege that the conduct of the trial court during trial was prejudicial to their case. Bynum and Parrish contend that the repeated interruptions and sidebars called by the court to instruct defense counsel

disrupted the trial and prevented plaintiffs' counsel from exercising his trial strategy. Bynum and Parrish contend that their trial counsel's opportunity to object was taken away and that the court's actions "'made plaintiffs' trial counsel appear incompetent and as if the trial court was protecting [plaintiff's] counsel." Brief for Appellant at 28. Bynum and Parrish claim that this conduct denied them their state and federal rights to counsel. Brief for Appellant at 29.

Bynum and Parrish however failed to raise the issue of trial court's prejudice prior to the verdict. Therefore, pursuant to Rule of Civil Procedure 227.1(b), plaintiffs have waived this issue. ***See Ware v. U.S. Fidelity and Guaranty Co.,*** 577 A.2d 902, 904-905 (Pa. Super. 1990) (concluding that prejudice of judge is waived unless raised prior to verdict).

Although the plaintiffs do not include the issue in their statement of questions presented, plaintiffs contend that the trial court committed reversible error regarding the "3:30 deadline". Brief for Appellant at 30-31. Plaintiffs contend that the imposition of the deadline and the requirement that if the jury did not decide before 3:30 p.m. they would have to return the next day was improper and caused the jury to rush to judgment. Brief for Appellant at 30-31. Plaintiffs contend this amounted to judicial coercion. Brief for Appellant at 30-31.

We first note that an appellant waives any question not contained in the statement of questions. ***See*** Pa.R.A.P. 2116(a). Additionally, even if the plaintiffs had included the deliberation deadline question in their statement of questions, we would waive the question because plaintiffs failed to make an objection to the jury instructions or raise the issue prior to the conclusion of the trial in violation of the Rules of Civil Procedure 226 and 227.1(b) respectively. Additionally, even if we were to address the merits of the issue, the record belies Bynum and Parrish's assertion of coercion. The trial court made it clear to the jurors that they

should not feel a need to conclude their deliberation by 3:30 and could feel free to return the next day to continue to deliberate. N.T. 6/8/00, at 695. For all the foregoing reasons, we conclude that the question regarding the "deadline" is meritless.

Because we have concluded that the admission of the testimony regarding the prior and contemplated abortions was error mandating a new trial, we reverse the judgment and remand for a new trial.

Judgment **REVERSED.** Case **REMANDED** for further proceedings consistent with this Memorandum. Jurisdiction **RELINQUISHED.**

Judge McEwen concurs in the result.

Judge Joyce files a Concurring and Dissenting Memorandum.

Judgement Entered.

/s/_____
Prothonotary

Date: MAY 29 2002

DIANE BYNUM AND FOUNTAIN PARRISH,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
	:	
v.	:	
	:	
THOMAS JEFFERSON UNIVERSITY HOSPITAL AND DR. PHILIP HIRSCHMAN AND HEE-OK PARK CHAI, M.D.,	:	
Appellees	:	No. 3485 EDA 2000

Appeal from the Judgment entered February 12, 2001, In the Court of Common Pleas, Philadelphia County, Civil Division at Nos. 923 March Term, 1998 & 2294, December Term 1998.

BEFORE: MCEWEN, JOHNSON and JOYCE, JJ.

FILED MAY 29, 2002

CONCURRING AND DISSENTING MEMORANDUM BY JOYCE, J.

While I am in agreement with the resolution of Appellants' first, fourth and fifth issues, I write separately to express my disagreement with the resolution of the second and third issues.

These issues are as follows:

> II. Whether the trial court committed reversible error in permitting testimony concerning [Ms. Diane Bynum's] consideration of the termination of this pregnancy by abortion?
>
> III. Even If issues concerning . . . consideration of abortion are relevant, it was [sic] still excluded pursuant to Rule 403 of the [Pennsylvania] Rules of evidence and it was reversible error to permit cross examination.

Brief for Appellants, at 4.

At trial, the critical question was whether or not Appellant,[1] Ms. Diane Bynum informed Dr. Phillip Hirshman, during the December 20, 1996 prenatal visit, that she was experiencing decreased fetal movement. During the prenatal visit, Dr. Hirshman indicated in the prenatal flow record that the fetus had a positive heartbeat. The flow record also indicated fetal movement. After making these observations, Dr. Hirshman instructed Ms. Bynum to return in one week to be induced if she had not gone into spontaneous labor. Ms. Bynum contends that during the prenatal visit she told Dr. Hirshman that she was experiencing decreased fetal movement. Dr. Hirshman denies that Ms. Bynum told him of the decreased movement. He claims that had Ms. Bynum informed him of the decreased movement, he would have performed more tests prior to sending her home.

Thus, on the issue of liability, the jury was required to determine whether or not Ms. Bynum informed Dr. Hirshman that she was experiencing decreased fetal movement. If Dr. Hirshman was so informed but he failed to take proper action and sent Ms. Bynum home instead, the jury could reasonably find him negligent. If on the other hand, Dr. Hirshman was not informed of the decreased fetal movement, the jury could conclude that his failure to perform more tests or take other action did not fall below the applicable standard of care. Thus on the issue of liability, *i.e.*, failure to adhere to the proper standard of care, the fact that Ms. Bynum has had a previous abortion or the fact that she contemplated abortion in the early stages of the pregnancy at issue here, is clearly irrelevant.

---

1 The other Appellant is Mr. Fountain Parrish. Appellants are the "parents" of the stillborn fetus. **See** Plaintiffs' Complaint, filed 3/12/1998, at ¶ 10.

With respect to damages[2] however, I think that Ms. Bynum's contemplation of abortion in the early stages of the pregnancy is very relevant. Ms. Bynum's testimony established that she considered terminating the pregnancy at issue in this case, voluntarily and for reasons unrelated to her health or physical well-being or those of the fetus. The pertinent testimony elicited on cross-examination concerning the contemplation of abortion is as follows:

> Q: And then ma'am [your medical record] indicates, "Would pregnancy be a problem at this time?" And, again, this is the pregnancy that we're talking about in this case. And you indicated, "Yes." Do you recall that ma'am?
>
> Mr. Keenheel [Appellants' counsel]: Objection, Your Honor.
>
> The Court: Legal basis?
>
> Mr. Keenheel: Irrelevant.
>
> The Court: Overruled. You may answer the question.
>
> A [Ms. Bynum]: Yes, that's it.
>
> Q: And then, ma'am, [your medical record] indicates "Complaints; Symptoms." It indicates, "She's considering terminating pregnancy." Did you tell that to the Family Planning Clinic with regard to this pregnancy; that after you learned

---

2 Appellants' claim for damages was premised on emotional distress:

> ¶ 88. The conduct of each defendant was extreme and outrageous, and intentionally or recklessly caused plaintiffs to suffer emotional distress.
>
> ¶ 89. The defendants engaged in such conduct with knowledge that severe emotional distress was certain or substantially certain to result from their conduct.
>
> ¶ 90. By reason of the foregoing, each defendant is liable to the plaintiffs for the severe emotional distress incurred.

Plaintiffs' Complaint, Filed 3/12/1998, at ¶ 88 - ¶ 90.

> that you were pregnant, that you were considering another abortion?
>
> A: Yes sir. I was surprised to find that I was pregnant. I went for – to take birth controls; and they told me I was pregnant. I was in college. So I was surprised. But, obviously, that wasn't my choice.

N.T. 6/5/2000, at 126-127

Ms. Bynum's contemplation of abortion indicates the value she placed on the fetus; the value placed on the fetus impacts on how emotionally distressed, if at all, Ms. Bynum would be upon losing the fetus. If Ms. Bynum placed so little value on the fetus that she contemplated aborting the fetus, then her level of emotional distress would not be the same as that of a woman who valued the fetus all through the pregnancy and never contemplated an abortion at any stage. Even though Ms. Bynum ultimately decided not to abort the fetus, her earlier contemplation of abortion sheds some light on her emotional disposition towards the fetus.

Since Appellants are seeking damages for emotional distress for the stillbirth of the fetus, their emotional disposition towards the fetus as well as the value they placed on the fetus at every stage of the fetal development, is highly relevant. An illustration would buttress this point more forcefully: It is common knowledge that smoking, consumption of alcohol and illegal narcotics are detrimental to fetal health, development and well being. If a pregnant woman engaged in these activities at any stage of her pregnancy, it is reasonable to conclude that this conduct reflects on the value she placed on the fetus. Individuals normally do not harm things or persons they value or care about. Along these lines, in the case at bar, Ms. Bynum's contemplation of harming or aborting the fetus earlier in the pregnancy is relevant to the determination of her emotional disposition towards the fetus. ***See*** Pa.R.E. 401 (" 'Relevant evidence' means evidence having any tendency

to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

Admittedly, evidence of Ms. Bynum's consideration of abortion is prejudicial. However, the probative value of this relevant evidence is not outweighed by its prejudicial effect. ***See*** Pa.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). Indeed, excluding this evidence would deprive the fact-finder of an accurate picture of Ms. Bynum's emotional disposition towards the fetus. Thus, I would hold that evidence of Ms. Bynum's contemplation of an abortion is admissible for purposes of damages pursuant to Pa.R.E. 401 and Pa.R.E. 403.

Because the trial in this case was not bifurcated, I cannot conclude that the admission of evidence regarding the contemplated abortion was erroneous. In my view, this is a case that loudly cries out for bifurcation between the liability phase and the damages phase. Therefore, I would remand for a new trial with instructions that the trial be bifurcated. At the liability phase, the evidence of the contemplated abortion is clearly inadmissible. For purposes of damages, however, I reiterate my view that the evidence is relevant and admissible.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

DIANE BYNUM FOUNTAIN PARRISH	: DECEMBER TERM, 1998
vs.	:
THOMAS JEFFERSON UNIVERSITY HOSPITAL	: NO. 2294

ORDER

AND NOW, this 21st day of November, 2000, it is hereby ORDERED and DECREED that Plaintiff's Post Trial Motions are DENIED.

BY THE COURT

/s/ MARK I. BERNSTEIN, J.
MARK I. BERNSTEIN, J.

DIANE BYNUNM AND FOUNTAIN PARRISH	: COURT OF COMMON PLEAS : PHILADELPHIA COUNTY, PA
v.	:
THOMAS JEFFERSON UNIV. HOSPITAL AND PHILIP HIRSHMAN, M.D.	: : DECEMBER TERM 1998 : NO. 2294

OPINION

By this appeal, plaintiffs seek a new trial because the court refused to allow the jury to decide issues which were not in the case. Although the claims against Thomas Jefferson University Hospital were exclusively grounded in the agency of Dr. Hirshman, which was admitted by Thomas Jefferson University Hospital, plaintiff requested the jury be permitted to find that defendant Thomas Jefferson University Hospital was independently liable. The Court refused and plaintiff claims error. By this appeal, plaintiffs further claims that, by requiring defense counsel ask proper questions instead of making speeches, the Court interfered with plaintiffs' counsel's courtroom "artistry" and his right to "do his thing". Further, plaintiffs claim error in permitting brief testimony of a prior pregnancy and contemplation of aborting the pregnancy at issue. Finally, although the verdict was delivered at 3:50 p.m. on June 8, 2000, plaintiffs claim that it was reversible for the trial Court to "refuse" to take a verdict after 3:30 p.m.

Plaintiffs, Diane Bynum and Fountain Parrish, instituted this medical malpractice action against defendants, Thomas Jefferson University Hospital, Jefferson Obstetrics and Gynecology Associates, Jefferson Associates in Radiology, Phillip Hirshman, M.D., Donald Mitchell, M.D. and Janio Szklaruk, M.D. in the Court of Common Pleas, Philadelphia in March of 1998. In December of 1998 Plaintiffs instituted a second action against Thomas Jefferson University Hospital, Thomas Jefferson Ob/Gyn Clinic and Hee-Ok Park Chia, M.D. A Petition to Consolidate these two cases was granted on September 10,

1999. All defendants, except Thomas Jefferson University Hospital and Dr. Hirshman, were dismissed by stipulation prior to the start of trial.

This case, originally tried before the Honorable Victor DiNubile, Jr., ended in a hung jury on April 14, 2000. Retrial began on June 5, before the Honorable Mark I. Bernstein. The only allegation against Thomas Jefferson University Hospital was vicarious liability for the actions of Dr. Hirshman, a resident doctor and hospital employee. Dr. Hirshman was also a named defendant. Defendant hospital agreed to take full responsibility for any negligence of Dr. Hirshman. On June 8, 2000, the jury returned a verdict that Dr. Hirshman was not negligent in his medical care. From this verdict, plaintiffs requested post trial relief.

A court has a duty to grant a new trial if it determines that the judicial process has effected a serious injustice, where there has been an error of law or where the verdict is against the clear weight of the evidence[1]. Upon review of this case, this Court must view the evidence in the light most favorable to the verdict winner.

This case arises out of a medical malpractice claim by Diane Bynum and her husband, Fountain Parrish, alleging negligence in failing to determine that plaintiffs' fetus had died in utero. No claim is made that any malpractice in any way caused the death in utero. The plaintiffs allege only damages for their own emotional distress for learning of the still birth three days later[2]. Ms. Bynum, a 28-year-old woman, had three pregnancies. Her first pregnancy resulted in a live birth, her second pregnancy was terminated by a voluntary abortion, and she suffered a still birth on her third pregnancy. Ms. Bynum's due date was December 23, 1996. On December 20, 1996, Dr. Hirshman saw Ms. Bynum for a prenatal visit. At that visit Ms. Bynum did not complain of decreased fetal movement. Dr. Hirshman

---

1 *Austin v. Ridge*, 435 Pa. 1, 255 A.2d 123 (1969).

2 No claim is presented on behalf of the stillborn fetus.

testified that if he had been told of decreased fetal movement he would have immediately ordered further testing[3]. At this visit, the prenatal flow record demonstrated a positive fetal heartbeat and fetal motion. Ms. Bynum was told to return in one week to be induced if she had not yet gone into spontaneous labor.

On December 23, 1996, Ms. Bynum went to the hospital and complained that she had not felt any fetal movement that morning. She was seen by two Obstetrician/Gynecologist residents. An ultrasound was performed. No fetal motion and no fetal heart tones were detected. It was determined that the fetus was dead. The jury could properly find from the evidence that the fetus died only after the medical visit of December 20, 1996 and therefore there was no negligence whatsoever.

Plaintiffs allege that the Court improperly refused to include questions about direct liability of defendant, Thomas Jefferson University Hospital, in the jury interrogatories. There was no evidence whatsoever presented of any direct liability by Thomas Jefferson University Hospital. The only claim against the hospital was through its agent, Dr. Hirshman. Plaintiffs acknowledge that there is no evidence of any independent theory of liability concerning Thomas Jefferson University Hospital[4]. The following exchange took place at trial between the Court and counsel:

THE COURT: There's no independent theory against Thomas Jefferson; right?

MR. KEENHEEL: No, sir.

THE COURT: Then over your objection, the Jury Interrogatories will not included any reference to Thomas Jefferson. You can argue about Thomas Jefferson. I don't have any problem with that. But if counsel is agreeing, on behalf of Thomas Jefferson, that any verdict against Dr.

---

3 N.T.- 6/6/00, at 424.

4 N.T.- 6/6/00, at 463.

Hirshman can be molded to include Thomas Jefferson, the jury is not going to get any question about Thomas Jefferson, except on the caption. They'll be on the caption."[5]

The decision to grant a request for jury interrogatories is discretionary and must be determined based on "whether such would add to a logical and reasonable understanding of the issue.[6]" Unnecessary jury interrogatories "can create misleading issues and defeat justice.[7]"

In *Greet v. Arned Corp.*[8], plaintiff was injured when a scaffolding collapsed. A verdict for the plaintiff ensued. The defense appealed the verdict claiming error in refusing to ask specific questions of the jury. The defendant claimed the trial court erred when it refused a request for special interrogatories on the issue of contributory negligence. The Supreme Court found that the trial judge property denied this request, because there was no evidence from which contributory negligence could be found. A judge should submit a special interrogatory only when doing so will "add to a logical and reasonable understanding of the issues[9]." Further, "(t)o permit the jury to return special findings, where they are unnecessary, can create misleading issues and defeat justice.[10]" Further, this was not in error as "(n)o evidence was presented by [defendant] showing any contributory negligence on the part of [plaintiffs] . . . "[11]

Allowing the jury to determine whether Thomas Jefferson University Hospital was independently liable, when there was no evidence of independent liability, would only invite a finding of direct liability where even plaintiffs

---

5 N.T.-6/6-00, at 463.

6 *Century 21 Heritage Realty, Inc. v. Blair*, 386 Pa.Super. 373, 563 A.2d 114 (1989).

7 *Willinger v. Mercy Catholic Medical Center*, 482 Pa. 411, 445, 393 A.2d 1188, 1190 (1978).

8 *Greet v. Arned Corp.*, 412 Pa. 292, 194 A.2d 343 (1963).

9 Id. at 345.

10 Id. at 345.

11 Id. at 346.

concede there was no evidence to support such a verdict. The Court gave the jury the following instruction concerning the hospital's liability:

> You were told, at the beginning of the trial, that Thomas Jefferson University Hospital was the defendant. They take full responsibility for Dr. Hirshman's activities; and we will mold a verdict after you have reached it. Therefore, whatever verdict is reached against Dr. Hirshman is also reached against Thomas Jefferson University Hospital; and you will find no mention whatsoever on the questions concerning Thomas Jefferson University Hospital. He was their employee during the times in question, and they accept that[12].

This instruction made it clear that Thomas Jefferson University Hospital assumed all responsibility for Dr. Hirshman's liability and did not dispute that Dr. Hirshman was its agent, acting in the course and scope of his employment. An employer is responsible for the torts of his employee that occur within the scope of his employment[13]". Where such responsibility is admitted, there is no question for jury determination. To include the interrogatory requested would invite confusion or worse, an inconsistent verdict unsupported by any evidence[14]. Thus, no error was committed in refusing to grant plaintiffs' request to independently include Thomas Jefferson University Hospital in the jury interrogatories.

Plaintiffs also allege that the conduct of the trial court was prejudicial. During the course of the trial, discourtesy occasionally compelled the Court to instruct defense counsel and witnesses.

The Court did not allow a witness to interrupt counsel:

---

12 N.T.- 6/8/00, at 694.

13 *Johnson v. Glenn Sand and Gravel*, 308 Pa.Super. 22, 453 A.2d 1048 (1982).

14 *Greet*, at 346.

> [Mr. Britton] Q: My question is, simply, you testified . . .
>
> [Ms. Bynum] A: Yes, I did sir.
>
> The Court: Excuse me. Excuse me. You need a full question before you can possibly answer.[15]

The Court did not allow counsel to ask multiple questions before any answer was given:

> [Mr. Britton] Q: Does your insurance card indicate "Thomas Jefferson OB/GYN clinic?"
>
> Where is your insurance card?
>
> The Court: Which question do you want answered?[16]

The Court did not allow a witness to present irrelevant testimony from a prior proceeding when the question did not call for such prejudicial material:

> [Mr. Britton] Q: to the extent that there would be testimony in this case by a Dr. Brill that he took the complete medical history from your wife, you would disagree that such a thing happened; correct?
>
> The Court: Objection overruled. That is a proper question. You can answer it.
>
> [Mr. Parrish] The Witness: Sir, according to my testimony and the testimony of Dr. Mass in prior proceedings . . .
>
> Court: You weren't asked about Dr. Mass in any prior proceedings. If there is testimony in his case that a Dr. Brill interviewed your wife while at the Hospital, would you disagree with that testimony?
>
> The Witness: Yes, sir.

---

15 N.T.- 6/5/00, at 100.

16 N.T.- 6/5/00, at 178.

The Court: Next question.[17]

The Court did not allow Defense counsel to make speeches instead of asking questions:

> [Mr. Britton] Q: It's very possible, Doctor, that if a nonstress had been done, it may have been perfectly normal and reassuring.
>
> Court: That is a statement.
>
> Q: Would you agree with me, Doctor, that a nonstress may very well have been reassuring?
>
> [Dr. Polin] A: I would not agree with you at all.
>
> Q: That's your opinion because of what you've been . . .
>
> Court: Is this a question or a statement?[18]

The behavior of defense counsel culminated in a final instruction by the Court, outside the presence of the jury, that counsel would either ask questions or his examination would be terminated:

> The Court: Mr. Britton, you have tried at least two other cases in front of me. You have received my written instructions that said you must ask questions, and may not make statements posing as questions. You have been repeatedly instructed that way in this trial; and I will absolutely not permit you to lead your own witness through nonquestions. You will either ask questions of your witnesses, or the examination will be terminated.
>
> Any questions?
>
> Mr. Britton: No, sir.

The Court immediately reconsidered the harshness of the remedy for making speeches:

---

17 N.T. -6/5/00, at 216.

18 N.T. -6/6/00, at 327.

> The Court: Counsel, we're back on the record. On reflection Mr. Britton, the preclusion of presenting a proper case on behalf of your client is much too severe, even for not asking questions. If you can't ask questions, I will require you to write out your entire direct examination of every witness before you begin.[19]

It is within the province of the trial judge to object to inappropriate lines of questioning, inappropriate manner of questioning or to ask a witness to clarify an answer. It is within the scope of the trial judge's duties to "confine arguments within the limitations of legitimate advocacy"[20]. It is the proper function of a trial judge to control their courtroom[21]. "A trial judge is not required to remain mute when counsel speaks of irrelevant and prejudicial matters ... counsel may properly be admonished on such occasions without nullifying the entire trial as long as the trial judge does not display partiality or prejudice by his conduct, manner of speech, or choice of language[22]." Plaintiffs' counsel never objected at trial to the Court's proper control at trial.[23] Indeed, defense counsel, recognizing the propriety of the Courts instruction, never objected. "It is the proper role and function of the trial judge to exercise his judicial powers in such a manner as to give the jury the opportunity to hear the case free from irrelevant issues and appeals to passion and prejudice . . . it is ultimately the authority and the responsibility of the trial judge to maintain the atmosphere appropriate for a fair, rational and civilized

---

19 N.T. -6/6/00, at 377.

20 *Commonwealth v. Holley*, 358 Pa. 296, 301, 56 A.2d 546, 549 (1948).

21 *Behr v. Behr*, 548 Pa. 144, 695 A.2d 776 (1997).

22 *Commonwealth v. Phillips*, 183 Pa.Super. 377, 384-85, 132 A.2d 733, 737 (1957).

23 Since plaintiffs failed to raise the issue prior to verdict, any objection has been waived. *See Commonwealth v. Hammer*, 508 Pa. 88, 494 A.2d 1054 (1985).

determination of the issues, and to govern the conduct of all persons in the courtroom, including attorneys.[24]"

Plaintiffs make no allegation of prejudice or bias on the part of the Court. Neither do plaintiffs make any allegation that the discretion exercised to control the courtroom was either incorrect or inappropriate. Rather, plaintiffs only allege that plaintiff might not have objected to defense counsel's abuses. The objection is that the Court strictly maintained the trial as a serious search for the truth. There is no right to make a trial incoherent by not objecting to inappropriate evidence or inappropriate behavior by opposing counsel. No legitimate allegation of error is raised.[25]

Plaintiffs further allege that Ms. Bynum's prior abortion and consideration of aborting the pregnancy in question were irrelevant. These facts were relevant to a proper assessment of the liability claim and damages, had the jury found negligence. The only damage alleged was distress of the parents in learning of the stillbirth three days later. The only element of damages claimed was compensation for the emotional distress suffered by parent plaintiffs. Defendant's examination of Ms. Bynum concerning her abortion was limited:

> [Mr. Britton] Q: You see the date of December twenty, 1996; correct?
>
> [Ms. Bynum] A: Yes.
>
> Q: And it indicates here "ECE." Do you see, on 12/23/96?
>
> A: Yes, sir.

---

24 *Commonwealth v. Brown*, 490 Pa. 560, 575, 417 A.2d 181, 189 (1980), quoting the ABA STANDARD RELATING TO THE FUNCTION OF THE TRIAL JUDGE, Comment to §1.1 (a)&(b) (1972).

25 See *Commonwealth v. Harris*, 550 Pa. 92, 104, 703 A.2d 441, 447 (1998), where cautioning counsel not to editorialize, warning counsel not to mislead the jury, and clarifying the testimony of a witness were approved.

Q: That was, in fact, your due date; correct?

A: Yes, sir.

Q: And over here it indicates "G," gravida, which is the number of times you were pregnant. Were you pregnant three times?.

A: Yes, sir.

Q: And you had delivered – this was the third time you were pregnant; correct?

A: Yes, sir.

Q: And you had delivered one child previously?

A: Yes, sir.

Q: And that child's name and age is what?

A: Chanelle. She is nine years old.

Q: She is nine years old?

A: Yes.

Q: And the second time . . .

Mr. Keenheel: Objection, Your Honor.

The Court: Basis? Legal Basis?

Mr. Keenheel: Can we have a sidebar?

The Court: Absolutely.

(Whereupon the following took place at sidebar, outside the presence of the Jury:)

The Court: Yes, sir?

Mr. Keenheel: I'm objecting to the fact that Mr. Britton is going to bring up the fact that she had an abortion.

Mr. Britton: It's very relevant.

The Court: Excuse me. Just wait. Okay. Anything further?

Mr. Keenheel: No, sir. Just irrelevant and prejudicial, and has nothing to do with what happened on December twentieth.

The Court: Mr. Britton?

Mr. Britton: It's very relevant.

The Court: What is it very relevant to?

Mr. Britton: It's very relevant, because there's evidence during this pregnancy that when she got pregnant, she was considering an abortion as well. So it's very relevant that she was suing for damages, because she had a — she's suing for damages because she had a stillborn baby; and in the past, she had an abortion, and she was considering having an abortion here. It's part of her medical history.

The Court: I don't care about her medical history. You're suing for emotional distress, as I understand it. Maybe I'm wrong. Your damages are the emotional distress of learning that her baby was stillborn in the way she learned it, rather than being told by the Doctor, or rather than going to the Hospital right then and there and being told; right?

Mr. Keenheel: Right.

The Court: That's the only element of damages; right?

Mr. Keenheel: Yes, sir.

The Court: The questions of prior abortions and abortion concerning this baby is entirely relevant for the jury to understand how to compensate her; so the objection is overruled[26].

---

26 N.T. -6/5/00, at 104-107.

Plaintiff further made the accuracy of the medical record which included the prior abortion relevant to the issue of liability. Plaintiffs claimed that the defendant intentionally altered Ms. Bynum's medical records. Plaintiffs allege that the defendant tampered with her records. Ms. Bynum's abortion was contained in these records. Defense counsel was properly permitted to question Ms. Bynum to demonstrate that these records were in fact accurate. Having called into question the accuracy of the records and thereby asking the jury to find deliberate activity to conceal the truth, all parts of the medical record which plaintiffs acknowledged as accurate became relevant to prove that the medical records were in fact correct and unaltered. The Court properly admitted the evidence.

Plaintiffs further claim that the probative value of Ms. Bynum's prior abortion and her consideration of aborting this very pregnancy was outweighed by their prejudicial effect. "(Relevant) evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice . . .[27]" It is the responsibility of the trial judge to balance the probative value of the evidence against any prejudicial effect[28]. The evidence was probative both as to liability and for the proper evaluation of the claim of emotional distress damages. The issues were appropriately, briefly, and compassionately addressed at trial. Testimony about the abortion was not presented in an inflammatory or sensational manner. It was mentioned but once in a factual manner. The totality of the testimony is contained in two pages of transcript[29]. The testimony concerning Ms. Bynum's abortion was limited to the following examination:

---

27 Pennsylvania Rules of Evidence, Rule 403.

28 *Morrison v. Commonwealth*, 538 Pa. 122, 646 A.2d 565 (1994); *Commonwealth v. Boyle*, 498, 447 A.2d 250 (1982); *Brinch v. Jounce*, 757 A.2d 388 (Pa.Super. 2000); *Henery v. Shadle*, 443 Pa.Super 331, 661 A.2d 142 (1996).

29 N.T. 6/5/00, at 126-127.

[Mr. Britton) Q: I think that what we were going through is that you were pregnant three times. You were pregnant–this time was one time. You had a daughter who was 9 years old. That was the second time. And the third time that you were pregnant was in 1992.

And am I not correct, that that pregnancy terminated in an abortion?

[Ms. Bynum] A: Yes sir.[30]

Q: Ms. Bynum, I was beginning to show you the records for the visit on 12/20 and there was this issue of one of the three pregnancies had been terminated in an abortion. And I think we were at that point and time we took a break.

When you came into the clinic- this is a Jefferson University Family Planning – it indicates that you first came on 4/30/96. Does that generally comport with approximately the time you came to the family Planning Clinic?

A: Yes sir.

Q: Do you-at the bottom here- well it has your address. And that was your address at the time; was it not?

A: Yes sir.

Q: You have in front of you, and you can look at it if you, like.

It indicates that you were pregnant before, and you indicated at that time two pregnancies.

Number of abortions, one. That's correct; is it not?

A: yes sir.[31]

---

30 N.T.-6/5/00, at 104.

31 N.T.-6/5/00, at 125-126.

Plaintiffs were not prejudiced by the admission of Ms. Bynum's prior abortion, nor her contemplation of aborting this pregnancy. The evidence was admissible to rebut plaintiffs' claim of medical tampering with the records and to give a full picture to evaluate the only damages claimed, the parents emotional distress resulting from a "late" discovery of miscarriage[32].

Finally, plaintiffs claim that the verdict was improperly received. Prior to Jury deliberations, the Court advised the jury that due to personal obligations no verdict would be taken after 4:00 p.m., but the jury could continue deliberating as long as they chose that day. If no verdict was reached by 4:00, any verdict reached would be delivered the next day. In the presence of counsel the jury was told:

> "We will permit you to deliberate as long as you like today; but I want to tell you that I will be leaving City Hall sometime between 3:30 and 4:00, and there will be no verdict taken after I leave. My son is graduating from eighth grade. I will be there, or I won't be around the next day. But you may continue deliberating until five, or if you chose; you can leave any time after 3:30 that you say, 'Okay, let's come back tomorrow.' Now in saying this, I do not in any way want to imply that you should rush a verdict and that it would be reasonable or unreasonable for you to conclude your deliberations by 3:30 today. That is entirely up to you. And I hope I'm not rushing you. I trust that I'm not. You will do what you need to do in order to fairly render the proper verdict in this case. I am certain of that.[33]"

The length of the Jury deliberations is within the Judge's discretion and will only be reversed if there is a

---

32 The Court notes that in finding no negligence the jury accepted defendant's evidence that there was a live fetus at the medical visit.

33 N.T.- 6/8/200, at 696.

finding of abuse of discretion or if the verdict was the product of coercion or an overworked fatigued jury[34]. In *Commonwealth v. Gartner*, the jury deliberated from 2:55 p.m. until 12:20 a.m., at 12:20 the trial judge encouraged the jury to continue deliberating, but gave them the option of taking a rest. The jury continued to deliberate and reached a verdict at 2:55 a.m. The Supreme Court found no coercion as "(t)he Court offered the jurors the opportunity to suspend their deliberations in order to rest for the night, but they apparently preferred to attempt a speedy resolution of the case[35]." Likewise, in this case there is no support for the allegation that the Jury suffered fatigue or was coerced, and there is no allegation that plaintiffs suffered any prejudice.

Further, plaintiffs raised no objection either when this instruction was given, or when the verdict was taken at 3:50 p.m.[36]. In order to preserve an issue for review, a party must make a timely objection[37]. No objection was raised until Post Verdict Motions were filed. Only after the verdict was rendered was any objection raised in Post Verdict Motions.

For the aforementioned reasons, the judgement of the Court should be affirmed.

BY THE COURT

/s/ MARK I. BERNSTEIN, J.
MARK I. BERNSTEIN, J.

May 16, 2001
DATE

---

34 *Commonwealth v. Gartner*, 475 Pa. 512, 381 A.2d 114 (1997).

35 Id. at 531.

36 Plaintiffs claim the verdict was received at 3:30 p.m., however, the copy of the timed notes of testimony reveals that the verdict was taken at 3:50 p.m.

37 *Dilliplaine v. Lehigh Valley Trust Company*, 457 Pa. 255, 322 A.2d 114(1974).